

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4006-7

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH P. D'ANGELO and
DAYCON INVESTORS ASSOCIATES, INC.

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE
COMMISSION, RESPONDENT

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DAYCON INVESTORS ASSOCIATES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of Order
of the Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Securities and Exchange Commission properly exercise its broad discretion in barring Joseph P. D'Angelo from associating with an investment adviser, where:

- (1) D'Angelo had been previously enjoined by a United States District Court from violations of the antifraud and other provisions of the federal securities laws;
- (2) D'Angelo willfully failed to disclose such injunction on his application with the Commission for registration as an investment adviser; and

- (3) D'Angelo willfully made untrue, false and misleading statements of material facts, and omitted to state material facts required by the Investment Advisers Act to be disclosed, in such application.

STATUTES AND RULES INVOLVED

Sections 203, 207 and 213 of the Investment Advisers Act; Sections 5(a) 5(c) and 17(a) of the Securities Act of 1933; Sections 10(b) and 12(g) of the Securities Exchange Act of 1934, and Rule 10(b) promulgated thereunder; Rules 17(b) and (f) of the Commission's Rules of Practice; and Form ADV are set forth in the attached Statutory Appendix.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

This is a petition for review of an order of the Securities and Exchange Commission which barred D'Angelo from associating with an investment adviser. There are two separate statutory bases upon which the sanction was imposed, either one of which constitutes grounds under the Investment Advisers Act for barring a person from the investment advisory business. First, D'Angelo has been previously enjoined by a United States District Court from violations of the federal securities laws. Second, in applications with the Commission for registration as an investment adviser, D'Angelo twice failed to disclose the injunction, willfully omitted to state other material facts, and willfully made false and misleading statements of material facts.

B. The Order under Review

Joseph P. D'Angelo and Daycon Investors Associates, Inc. ("Daycon") have petitioned this Court, pursuant to Section 213(a) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-13(a), to review an order of the Securities and Exchange Commission issued on December 16, 1976 (A. 239), 1/ Investment Advisers Act Rel. No. 562, which barred D'Angelo from being associated with an investment adviser. 2/ This order was issued at the conclusion of an administrative proceeding instituted by the Commission pursuant to Sections 203(c)(2) and 203(f) of the Investment Advisers Act, 15 U.S.C. 80b-3(c)(2) and (f).

The order instituting the proceedings in this matter alleged (A. 261), and the record established (A. 207-210, A. 239), inter alia, that: On September 29, 1970, D'Angelo had been permanently enjoined by the United States District Court for the Western District of New York against violating antifraud and other provisions of the federal securities laws, and that subsequently in

1/ The Appendix in this case is cited as "A. ____". That portion of the Appendix which petitioners have denominated exhibits is cited as "Ex. ____". Petitioners' Brief is cited as "Br. ____".

2/ The order of the administrative law judge (A. 221) also provided that the registration of Daycon as an investment adviser be denied. Daycon did not file a petition for review of the order of the administrative law judge with the Commission, and accordingly, that order became final pursuant to Rule 17(f) of the Commission's Rules of Practice. Investment Advisers Act Rel. No. 560 (December 9, 1976). Since petitioner Daycon failed to exhaust its administrative remedies by not seeking Commission review of the initial decision of the administrative law judge, its petition for review is not properly before this court. See Section 213(a) of the Investment Adviser Act, 15 U.S.C. 80b-13a. Moreover, D'Angelo, an officer of Daycon (A.204), may not represent Daycon in this appeal since this Court has previously held that "a corporation may not appear [before this Court] except through an attorney* * *." Phillips v. Tobin, 548 F.2d 408, 411 (C.A. 2, 1976).

applications with the Commission for registration as an investment adviser pursuant to Section 203(c)(1) of the Investment Advisers Act, 15 U.S.C. 80b-3(c)(1), petitioners willfully made untrue statements of material facts and omitted to state material facts required to be stated therein, in violation of Section 207 of the Investment Advisers Act, 15 U.S.C. 80b-7.

On October 20, 1976, a hearing was held before an administrative law judge of the Commission, at which D'Angelo appeared pro se (A. 1-164). On November 5, 1976, the administrative law judge rendered an initial decision (A. 200-231), holding, inter alia, that Daycon's application for registration did not satisfy the requirements of Section 203 3/ of the Investment Advisers Act and that D'Angelo violated Sections 203(e)(1) 4/ and 207 5/ of that Act. The administrative law judge ordered that: (1) the registration of Daycon as an investment adviser be denied; and (2) D'Angelo be suspended from being associated with an investment adviser for six months. There were two grounds for the imposition of this sanction — the injunction itself, and the failure to have made adequate disclosure concerning it (A. 219-221, A. 239).

Pursuant to Rule 17(b) of the Commission's Rules of Practice, 17 CFR 201.17(b), on November 11, 1976, the Commission's Division of Enforcement petitioned the Commission for review of the sanction imposed upon D'Angelo by the administrative law judge (A. 224). Noting that the administrative law judge's findings of fact were undisputed (A. 239), and taking into account the mitigative factors cited by D'Angelo and the administrative law judge, the Commission concluded that it was "not persuaded that D'Angelo meets

3/ See pages 20-21, infra.

4/ See page 21, infra.

5/ See page 11, infra.

the standards we consider requisite for association with an investment adviser." Accordingly, it ordered that D'Angelo be barred from being associated with any investment adviser, in the public interest (A. 240).

C. The Facts

Joseph P. D'Angelo 6/ is a shareholder, president, secretary, treasurer and Chairman of the Board of Daycon, a New York corporation (A. 204, 206). In June, 1976, D'Angelo sought to register Daycon with the Securities and Exchange Commission as an investment adviser (Ex. 1).

In the registration application on Form ADV filed with the Commission, D'Angelo indicated that Daycon's business activities include distributing and manufacturing burglar alarm devices, managing rental real estate, graphic design and technical writing, financial marketing services, business consulting, arranging mergers and acquisitions, and dealing in antique securities. (Ex. 1, 4; A. 206-207).

1. The Injunction against D'Angelo

From 1966 through 1970, D'Angelo was president of Tycodyne Industries Corporation, ("Tycodyne"). As noted above, on September 29, 1970, Tycodyne and D'Angelo were permanently enjoined, in an action brought by the Commission, from violating the registration and antifraud provisions of the federal securities laws (Ex. 3). 7/

D'Angelo consented, without admitting or denying the allegations of the complaint, to the judgment which enjoined him from violating Sections 5(a),

6/ D'Angelo is a dentist practicing in Buffalo, New York.

7/ Securities and Exchange Commission v. Tycodyne Industries Corp., Joseph P. D'Angelo and Raymond Dean, No. 1970-421 (W.D.N.Y.)

5(c), and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), 77e(c), and 77q(a); and Sections 10(b) and 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78l(g) and Rule 10b-5 promulgated thereunder, 17 CFR 240.10b-5. D'Angelo consented to the injunction for Tycodyne, as its president and chairman of the board, and for himself as an individual (Ex. 3).

D'Angelo was represented by counsel at the time he signed the injunction (Ex. 3). The injunction related to sales of unregistered securities by Tycodyne; the failure to register Tycodyne Securities; the sale of such securities by the use of fraudulent representations or omissions relating to Tycodyne's subsidiaries, products, financial condition, projected future sales, and outstanding shares; and proposed operation of a gambling casino in Haiti by Tycodyne (A. 207-208).

2. Daycon's Applications with the Securities and Exchange Commission for registration as an investment adviser.

a. The Statutory Requirements

Section 203(a) of the Investment Advisers Act, 15 U.S.C. 80b-3(a), makes it unlawful for any investment adviser, 8/ to use the mails or any means or

8/ An investment adviser is defined in Section 202(a)(11) of the Investment Advisers Act, 15 U.S.C. 80b-2(a)(11), as

"any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analysis or reports concerning securities;
* * *".

instrumentality of interstate commerce in connection with its business as an investment adviser unless it is registered under that Section. The Act requires that applications for registration as an investment adviser be filed with the Commission on such form as the Commission may prescribe, 9/ and the Commission, by rule, requires that such applications be file on Form ADV. 10/

Form ADV directs that certain disclosures be made concerning persons who are officers of corporations seeking registration as an investment adviser. Item 16(c) requires disclosure of whether any officer of the company has been enjoined by a court from engaging in any conduct in connection with the purchase or sale of any security. 11/

9/ Section 203(c)(1) provides:

"An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

10/ Investment Advisers Act Rule 203-1(a), 17 CFR 275.203-1(a), promulgated under Section 203 of the Act provides:

"[A]n application for registration as an investment adviser filed pursuant to Section 203(c) of the Act shall be filed on form ADV in accordance with the instructions contained therein."

Rule 0-3, 17 CFR 275.0-3 under the Act provides that the term "rules and regulations" includes "forms for registration and reports and the accompanying instructions thereto." Rule 204-1(c), 17 CFR 275.204-1 provides in effect, that any amendment to a Form ADV is a "report" within the meaning of Sections 204 and 207 of the Act.

11/ Item 16 requires that an applicant respond "yes" or "no" to:

(footnote continued.)

Item 17 of form ADV requires that a "Schedule D" be furnished for natural persons who are officers of the registrant or subject to any action reported under Item 16. In turn, Item VII of Schedule D requires disclosure, where the answer to any paragraph in Item 16 of form ADV was "yes", with respect to the person for whom the Schedule is being completed, of: the applicable paragraph of Item 16; title or description of action; name and location of court, agency, association or exchange; and nature and date of disposition or proceedings.

b. D'Angelo's First Application on Behalf of Daycon

On June, 1976, D'Angelo submitted an application with the Commission on behalf of Daycon for registration as an investment adviser (Ex. 1). Notwithstanding the injunction against D'Angelo, Item 16(c) of the application, (inquiring as to any injunction) was checked "no." Similarly, Item VII of the of the Schedule D filed for and by D'Angelo was left blank and the injunction was not disclosed.

After D'Angelo filed the Application, attorneys in the Commission's Division of Enforcement informed him by telephone that Daycon's application was inaccurate since it made no disclosure of the injunction, as required. They suggested that D'Angelo withdraw the application and submit a new one. Accordingly, on July 24, 1976, D'Angelo withdrew the application (Ex. C).

/ (footnote continued.)

"whether the Applicant or Registrant, any person named in items 12, 13, 14 and 15 or any Schedule thereunder, or any other person directly or indirectly controlling or controlled by the Applicant or Registrant, including any employee:

* * *

(footnote continued.)

c. D'Angelo's Second Application on Behalf of Daycon

On August 23, 1976, D'Angelo submitted a second application on behalf of Daycon for registration as an investment advisor (Ex. 4). In spite of the advice that the Commission's staff had given him that the law required him to disclose the injunction, Item 16(c) was again checked "no". Moreover, D'Angelo did not complete Item VII of Schedule D, required where the correct answer to Item 16(c) is "yes". He did, however, append a Schedule E, which is denominated "Continuation Sheet". The first column of that Schedule calls for the item number of the form being described, but in place of the item number, D'Angelo entered the words "CONSENT ACTION by the Securities and Exchange Commission". This schedule E contained a number of what the administrative law judge characterized as "self-serving paragraphs" (A. 210) relating to the Tycodyne matter. The opening statement is a declaration by D'Angelo that:

"I was president of a company, Tycodyne Industries Corporation, in which we were served a summons, File # Civ. 1970-421. This action was then terminated by a Consent Action by myself, Joseph P. D'Angelo, Tycodyne Industries Corporation, and Raymond C. Dean." (A. 222A)

In addition to the false answer to Item 16(c) and the failure to comply with the clear and specific requirements of Schedule D;

/ (footnote continued.)

(c) is permanently or temporarily enjoined by order, judgment or decree of any court from acting as an investment advisor, underwriter, broker or dealer, or as an affiliated person or employee of any investment company, or from engaging in or continuing in any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security". (emphasis supplied)

(1) Nowhere in the entire application, including the Schedule E, does the word "court" or "injunction" appear.

(2) Not only did D'Angelo fail to disclose the fact that he was enjoined and the substance of the injunction, but also he failed to disclose which court issued the decree.

(3) D'Angelo states, in two places on Schedule E, that he refused to sign the consent (Ex.4). In fact, however, he did sign the consent twice; once on behalf of Tycodyne and once on behalf of himself personally (Ex. 3).

(4) D'Angelo states, in sentence 1 of Schedule E: "[M]y only connection in this matter was that I was president during this period of time." Yet, in his testimony to the administrative law judge, he admitted that he was continually lending money to Tycodyne (A. 97), that he sold Tycodyne stock for the company (A.93), was not only president of Tycodyne but also was chairman of the Board (A. 99), that he devoted 40 to 50 hours per week to Tycodyne activities (A. 100), and that he presided over periodic meetings of the Board of Directors (A. 100).

The application which D'Angelo signed has printed upon it, adjacent to the place for signature:

"The Applicant or Registrant submitting this Form and its attachments and the person by whom it is executed represent hereby that all information contained therein is true, current and complete."

ARGUMENT

- I. THE INJUNCTION AGAINST D'ANGELO, TOGETHER WITH D'ANGELO'S FAILURE TO DISCLOSE SUCH INJUNCTION AND OTHER MISLEADING STATEMENTS IN HIS REGISTRATION APPLICATION, ARE SEPARATE STATUTORY GROUNDS FOR BARRING D'ANGELO FROM ASSOCIATION WITH AN INVESTMENT ADVISER.

D'Angelo was properly barred from the investment advisory business

both by reason of the previous injunction entered against him and for his failure to have adequately disclosed it. Section 203(f) of the Investment Advisers Act, 15 U.S.C. 80b-3(f) provides 12/ that the Commission may bar any person from being associated with an investment adviser, among other reasons, if such person has been enjoined from any conduct in connection with the purchase or sale of any security 13/, has made false or misleading statements or material omissions on an application for registration as an investment adviser, or violated any provision of the Investment Advisers Act, and the Commission finds such bar to be in the public interest.

As we have seen, D'Angelo has been enjoined from violations of the federal securities laws and submitted a false and misleading registration application. The false application also violated Section 207 of the Investment Advisers Act, 15 U.S.C. 80b-7, an additional statutory ground for the bar. 14/

12/ Arguing (erroneously) that the bar imposed upon D'Angelo "is more severe than that permitted by statute (sic)" (Br. 22), petitioners mis-cite this Section by placing a period after "twelve months" and omitting the words "or bar any such person from being associated with an investment adviser." Id.

13/ D'Angelo argues (Br. 5) that the injunction cannot be a basis for the sanctions imposed. The injunction was not the sole basis upon which the Commission imposed a sanction on D'Angelo; rather, the injunction together with the serious misrepresentations and omissions that violated Section 203(e)(1) and 207 of the Act formed the predicate for impositions of a bar on D'Angelo. It is clear from the wording of Section 203(f), however, that the Commission could have barred D'Angelo from association with an investment adviser on the basis of the injunction alone if it found such bar to be in the public interest.

14/ Section 207 provides:

"It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under Section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

II. THE COMMISSION'S CONCLUSION THAT IT WAS IN THE PUBLIC INTEREST TO BAR D'ANGELO FROM ASSOCIATION WITH AN INVESTMENT ADVISER WAS WELL WITHIN ITS BROAD DISCRETION.

In determining what the public interest required as an appropriate sanction against D'Angelo, the Commission considered the fiduciary nature of the relationship of an investment adviser to his clients. As the Supreme Court stated, in Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180, 191 (1963), "[t]he Investment Advisers Act of 1940 thus reflects a congressional recognition of the 'delicate fiduciary nature of an investment advisory relationship' * * *", citing 2 Loss, Securities Regulation (2d ed. 1961), 1412. The Supreme Court just last month reaffirmed the fiduciary nature of an investment adviser's responsibilities in Sante Fe Industries, Inc., et al. v. Green, et al., 45 U.S.L.W. 4317, 4320 (March 23, 1977), stating that "Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers." This Court itself has held that, as a fiduciary, an investment adviser is required to exhibit "[n]ot honesty alone, but the punctilio of an honor most sensitive." Rosenfeld v. Black, 445 F.2d 1337, 1344 (C.A. 2, 1971), certiorari denied sub. nom. Lazard Freres v. Rosenfeld, 409 U.S. 802 (1972), quoting Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.).

Daycon's registration application was not truthful. Thus, the unwary prospective client would be substantially misled if he relied on the registration form for background information concerning D'Angelo and Daycon as an investment adviser to whom he would entrust his financial future. The Commission cannot change the information on an ADV form and thus the appropriate means in the context of a proposed registration to correct this fraud and to prevent future fraud is to bring an administrative proceeding of the kind brought here.

D'Angelo's failure to submit a truthful registration application was more than a mere technical violation of the Act. As this Court has previously held in Marketlines, Inc. v. Securities and Exchange Commission, 384 F.2d 264, 267 (1967), certiorari denied, 390 U.S. 947 (1968), where the Commission revoked the registration of an investment adviser for, among other things, not disclosing that its vice-president had been found to have violated various sections of the securities laws in another proceeding, "[t]he registration and disclosure provisions are crucial to the operation of the Act and we cannot condone their blatant abuse." In this connection, the Court noted that the investment adviser has "an occupation which can cause havoc unless engaged in by those with appropriate background and standards."

D'Angelo's violations were willful. ^{15/} He testified that he was aware of the injunction against him at the time he filed both applications for registration. During the hearing he answered affirmatively the question, "Were you also aware of the judgment of permanent injunction against you at the time you signed that application, Division Exhibit 4?" (A. 49-50). Even if D'Angelo's assertion (A. 47) that he signed the second ADV form without reading it were true, this does not affect the seriousness of his offense. He had an affirmative duty to read the application, as he affixed his signature

^{15/} As noted above, the Investment Advisers Act permits the Commission to impose sanctions for willful violations of any provision of that Act. A finding of willfulness does not require a showing of intent to violate the law, it is enough that the person charged intentionally commits the act constituting the violation. Hughes v. Securities and Exchange Commission, 174 F.2d 969, 977 (C.A. 2, 1958); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A.D.C., 1965). This standard is in accord with the discussion of scienter in Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171, 181 (C.A. 2, 1976), where this Court noted that "even in the criminal context neither knowledge of the law violated nor intention to act in violation of the law is generally necessary for conviction."

adjacent to the statement that he represents "all information contained [in the application] is true, current and complete." 16/

Even if his claim that he was merely careless should be accepted, it would be clearly inconsistent with the fiduciary duties of an investment adviser if D'Angelo exhibited such carelessness or callousness toward the truth in his business dealing with his clients. As the Commission stated in its opinion (A. 240):

"The law judge * * * found little excuse for D'Angelo's failure to disclose the injunction in Daycon's application for registration, especially after our staff had alerted him to this deficiency. The judge characterized the reference to a 'consent action' in the resubmitted application as a 'transparent device to avoid the obvious. He further stated:

'If [D'Angelo's] failure to correctly answer Section 16(c) and Schedule D of the Application were an intentional device to deceive then D'Angelo should receive the severest sanction. If it were not so intentional he has exhibited inexcusable carelessness.'

16/ D'Angelo asserts that his "no" answer to item 16(c) was a mere typographical error (Br. 13). But, this case involves much more than a false answer to Item 16(c); as noted above D'Angelo also failed to disclose the injunction on Schedule D and made false and misleading statements on Schedule E. Moreover, the assertion that the "no" answer was a typographical error is inconsistent with D'Angelo's leaving Item VII of Schedule D blank. As the Commission has previously held in Justin Federman Stone, 41 S.E.C. 717, 723 (1963):

"The application for registration is a basic and vital part in our administration of the [Investment Advisers] Act, and it is essential in the public interest that the information required by the application form be supplied completely and accurately. The application form obligates the applicant to verify all statements contained in it are true, correct, and complete to the best knowledge and belief of the person executing the form. An applicant for registration cannot shift responsibilities for the truth and accuracy of the application to a clerical employee."

"We agree with the law judge's quoted statement." 17/

Assuming, arguendo, the truthfulness of D'Angelo's assertion that he did not intend to mislead, the Supreme Court has noted:

"To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the Statute." Securities and Exchange Commission v. Capital Gains Research Bureau, supra, 375 U.S. at 200.

For the foregoing reasons, even in light of the factors cited by D'Angelo and the administrative law judge as mitigative, the Commission found that the six month suspension imposed by the administrative law judge was inadequate. 18/

17/ As the Commission has previously held, in Edward J. Moschetti, 41 SEC 942, 943 (1964), a case where an application for registration as an investment adviser did not disclose a prior mail fraud conviction:

"The wording of the registration application is clear and explicit. It is incredible that even a hasty reading of the question would not have caused applicant, if not to understand immediately, then to pause and carefully consider the question for its obvious and correct meaning. We conclude that applicant's failure to disclose the mail fraud conviction in his application was a willful material omission and violated Section 207 of the Act."

* * *

"An investment adviser is a fiduciary in whom clients must be able to put their trust. [footnote omitted]. The conviction and applicant's failure to disclose it show a lack of the qualifications necessary for one who acts in that capacity. We conclude that the public interest requires that [the applicant's] application for registration be denied."

18/ This Court has repeatedly held that the "Commission clearly has the authority to modify, including the authority to increase, sanctions ordered by a hearing examiner in his initial decision." Hanly v. Securities and Exchange Commission, 415 F.2d 589, 599 (C.A. 2, 1969).

(footnote continued.)

D'Angelo mischaracterizes the sanction lawfully imposed by the Commission as a "bar for life" (Br. 23). ^{19/} In fact, however, there is nothing to preclude D'Angelo from applying again to be associated with an investment adviser if he can show that he meets the standards of the Investment Advisers Act. As the Commission has stated, in Applications for Relief from Disqualification, Investment Advisers Act Release No. 438 (Feb. 26, 1975), CCH Fed. Sec. L. Rep. ¶80,115.

"In the past the Commission has sometimes, in its discretion, granted applications for readmission to the securities business by individuals or firms it has previously barred from the securities business or some aspect thereof pursuant to statutory authority. [footnote omitted] The Commission

/ (footnote continued.)

See also, Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858 (C.A. 2, 1970); Fink v. Securities and Exchange Commission, 417 F.2d 1058, 1059-60 (C.A. 2, 1969); and Gross v. Securities and Exchange Commission 418 F.2d 103, 107 (C.A. 2, 1969). It is the Commission, not the administrative law judge, which Congress has entrusted with the ultimate responsibility and discretion to determine what sanctions are appropriate in the public interest in cases involving violations of the federal securities laws. See generally, Consolo v. Federal Maritime Commission, 383 U.S. 607, 620-621 (1966); and Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163-64, (C.A. 9, 1956).

^{19/} Petitioners claim that a "bar for life" is unconstitutional, citing Cummings v. Missouri, 71 U.S. (4 Wall) 277, 320-322 (1866); Ex parte Garland, 71 U.S. (4 Wall) 333, 380-81 (1866); and United States v. Lovett, 328 U.S. 303, 314 (1946). This case does not involve a bar from life, but in any event, the cases petitioners cite have no applicability. All involved bills of attainder. Garland and Cummings are cases which concerned statutes passed after the Civil War with the intent to exclude from certain professions persons who had aided the Confederacy, by requiring them to take an oath that they had never given such aid. These statutes were held invalid as being bills of attainder, as well as ex post facto laws. Similarly, Lovett held that the Urgent Deficiency Appropriation Act of 1943, which provided that the salary was to be paid to named government appointees unless again appointed by the president, was a bill of attainder and ex post facto legislation. In the present case, however, the Investment Advisers Act has been in effect since 1940, long before D'Angelo violated its provisions.

recognizes that situations may exist where, in light of changed circumstances and after the passage of a period of time, it may appear appropriate to the Commission, in its discretion, to permit a disqualified individual or firm to have the disqualification lifted if, in general, the applicant can make a showing satisfactory to the Commission that re-entry into the securities business would be consistent with the public interest."

* * *

"An application for registration by an investment adviser previously disqualified under Section 203(e) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(e), or by an investment adviser who seeks to employ an individual disqualified under Section 203(f) of the Act, 15 U.S.C. 80b-3(f), should be filed pursuant to Rule 203-1 thereunder, 17 CFR 275.203-1." 20/

In a similar vein, D'Angelo argues that the Commission's denial of Daycon's application for registration and bar against D'Angelo from associating with an investment advisor is "in reality severely sanctioning the D'Angelo children" (Br. 22-23). This argument is clearly without merit. Nothing in the Commission's order prohibits D'Angelo's children from registering as investment advisers or being associated with an investment adviser.

20/ In interpreting 15(b)(6) (formerly 15(b)(7)) of the Securities Exchange Act, 15 U.S.C. 78o(b)(6), which has language similar to Section 203(f) of the Investment Advisers Act ("It shall be unlawful for any person [who has been barred] from being associated with an investment advisor *** willfully to become, or remain, associated with an investment adviser without the consent of the Commission") this Court has noted that:

"the permanent bar order which the Commission in its discretion has imposed *** is not necessarily an irrevocable sanction; upon application, [footnote omitted] the Commission, if it finds that the public interest no longer requires the applicant's exclusion from the securities business, may permit his return -- usually subject to appropriate safeguards." Harly v. Securities and Exchange Commission, supra, 415 F.2d at 598. Cf. Arthur Lipper Corp. v. Securities and Exchange Commission, supra.

As this Court has previously held, the "imposition of sanctions must necessarily be entrusted to the expertise of a regulatory commission such as the SEC". Harly v. Securities and Exchange Commission, supra, 415 F. 2d at 598. Likewise, this Court has repeatedly stated that it is "not free to examine the appropriateness of action taken by the Commission [in choosing the 'severe sanction' of revocation] as if it were before us in the first instance." Marketlines, Inc. v. Securities and Exchange Commission, supra, 384 F.2d at 4. 21/

As the Supreme Court, in American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 12 S. 3 (1946) has stated:

"It is a fundamental principle * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence * * *."

"While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or has no justification in fact should a court attempt to intervene in the matter."

21/ See Tager v. Securities and Exchange Commission, supra, 344 F.2d at 9; Sinclair v. Securities and Exchange Commission, 444 F.2d 399, 402 (C.A. 2, 1971); Hiller v. Securities and Exchange Commission, supra, 429 F.2d at 858; Fink v. Securities and Exchange Commission, supra, 417 F.2d at 1058; Gross v. Securities and Exchange Commission, supra, 418 F.2d at 107; Vanasco v. Securities and Exchange Commission, 395 F. 2d 349, 352-353 (C.A. 2, 1968); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (C.A. 2, 1967); Nassau Securities Service v. Securities and Exchange Commission, 348 F.2d 133, 136 (C.A. 2, 1965); Berko v. Securities and Exchange Commission, 316 F.2d 137, 141-142 (C.A. 2, 1963); Boruski v. Securities and Exchange Commission, 289 F.2d 738, 740 (C.A. 2, 1961). See generally 2 Loss, Securities Regulation 1323-1326 (2 ed. 1961).

As we have seen, the Commission properly evaluated the seriousness of petitioners' material misstatements and omissions on their application for registration in light of the fiduciary obligations of investment advisors, and correctly imposed the sanctions authorized by the Investment Advisers Act for protection of the public interest.

III. THE COMMISSION'S DENIAL OF DAYCON'S APPLICATION FOR REGISTRATION AS AN INVESTMENT ADVISER WAS MANDATED BY SECTION 203(c)(2) OF THE ACT. 22/

Section 203 of the Investment Advisers Act requires applicants for

21/ (footnote continued.)

Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171 (C.A. 2, 1976), rehearing denied, Mar. 23, 1977, is not to the contrary. Lipper reflects, at best, a determination by this Court that Commission remedies should be modified only where "special circumstances" are present. Although we respectfully disagree that the Lipper decision reflects a correct articulation of a reviewing court's functions, here there are no "special circumstances" that would warrant any modification of the Commission's order. Thus, Lipper, an existing broker-dealer was barred from further activities in that capacity; here, D'Angelo — a man who has repeatedly and willfully filed false registration papers with the Commission, even after having been advised of his obligation to tell the truth — is being denied an opportunity in the first instance to visit half-truths and misrepresentations upon his future clients. Moreover, in Lipper, this court was concerned about the "considerable uncertainty as to the regulatory climate * * *" applicable to Lipper's fraudulent conduct. While we respectfully disagree as to the relevance of uncertainty in Lipper with respect to the "blatant fraud" this court found on Lipper's part, here there is not even arguable uncertainty about the need to tell the truth on applications for registration as an investment adviser. Indeed, even when the Commission's attorneys advised D'Angelo that he must disclose the injunction against him, he submitted a second application without such disclosure. Moreover, this Court in Lipper was "moved also by the inordinately long time in which this proceeding has been pending, particularly the unexplained lapse of over three years from the argument to the decision of the Commission * * *." 547 F.2d at 184. By contrast, in this case D'Angelo submitted his second application in August, 1976, and the Commission issued its final decision on December 16, 1976.

22/ We have noted (page 3, n. 2) that Daycon did not seek review by the Commission of the denial of its application by the administrative law judge. Thus, this issue is not before this Court.

registration to disclose, among other things, whether any person associated with the investment adviser has: 23/

(1) made false or misleading statements in any application for registration as an investment adviser, or has omitted to disclose any material fact required to be stated therein;

(2) been enjoined from any conduct in connection with the purchase or sale of any security; or

(3) has willfully violated any provision of the federal securities laws.

23/ Section 203(c)(1)(G) of the Investment Adviser Act requires disclosure of

"whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section* * *."

In turn, subsection (e) provides for sanctions against a registrant who

"(1) has willfully made or caused to be made in any application for registration* * * any statement which was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

* * *

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction when acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, * * * or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of * * * this title * * *".

As the injunction against D'Angelo was not disclosed, 24/ and because the information in Daycon's application concerning what D'Angelo termed "consent action by the Securities and Exchange Commission" was false and misleading, the Commission properly found that Daycon's application did not meet the requirements of Section 203 of the Act. Accordingly, Section 203(c)(2) requires that "[t]he Commission shall deny such registration [as an investment adviser], if it does not make such a finding [that the requirements of Section 203 are satisfied] or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section." (emphasis supplied)

Thus, the Commission correctly applied the statutory requirements of the Investment Advisers Act in denying Daycon's Application.

25/ Petitioners state (Br. 6) that "[t]he basis of the Securities and Exchange Commission denial of Daycon's application for registration is the mere existence of D'Angelo's consent to the final judgment of permanent injunction rendered in the case of Securities and Exchange Commission against Tycodyne Industries Corporation, Joseph P. D'Angelo and Raymond Dean ***". The facts are otherwise; Daycon's application was denied because it did not meet the requirements of Section 203 in that it did not disclose the injunction and contained false and misleading statements of material fact.

CONCLUSION

For the foregoing reasons, the order of the Commission under review should be affirmed.

Respectfully submitted,

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April, 1977

STATUTORY APPENDIX

Section 203 of the Investment Advisers Act

§ 80b-3. Registration of investment advisers

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) of this section shall not apply to--

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under subchapter I of this chapter.

(c)(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

(d) Any provision of this subchapter (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (d) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration of such person.

Section 207 of the Investment Advisers Act

§ 80b-7. Material misstatements

It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

Section 213 of the Investment Advisers Act

§ 80b-13. Court review of orders

(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 5(a) of the Securities Act of 1933

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 5(c) of the Securities Act of 1933

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.¹

Section 17(a) of the Securities Act of 1933

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10(b) of the Securities Exchange Act of 1934

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 12(g)(1) of the Securities Exchange Act of 1934

(g)(1)¹ Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall—

(A) within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from the effective date of this subsection on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

Rule 17(b) and (f) of the Commission's Rules of Practice

(b) Petition for review; procedure. Any person who seeks Commission review of an initial decision by a hearing officer shall, within 15 days after service of such initial decision, serve and file a petition for Commission review containing exceptions thereto indicating specifically the findings and conclusions as to which exceptions are taken together with supporting reasons for such exceptions. These reasons may be stated in summary form. Any objection to an initial decision not saved by written exception filed pursuant to this rule will be deemed to have been abandoned and may be disregarded.

(f) Effect of initial decisions. Unless a party or other person entitled to seek review of an initial decision timely files a petition for review, or unless the Commission on its own initiative orders review, such initial decision shall become the final decision of the Commission with respect to those parties who have not timely filed a petition for review of the initial decision. In the event that the initial decision becomes the final decision of the Commission with respect to a party, such party shall be duly notified thereof by the Secretary of the Commission and a notice thereof shall be published, unless the Commission otherwise directs, in the Securities and Exchange Commission News Digest. The notice to the party shall state that the time for filing of a petition for review of the initial decision by the party has expired and that the Commission has determined not to order review of the initial decision on its own initiative and shall specify the date on which the order shall become effective. If a petition for review is timely filed by a party or action to review as to a party is taken by the Commission upon its own initiative, the initial decision shall not become final as to that party.

FORM ADV
(Instruction
Sheet)

**APPLICATION FOR REGISTRATION AS AN INVESTMENT ADVISER OR TO AMEND
SUCH AN APPLICATION UNDER THE INVESTMENT ADVISERS ACT OF 1940**

SECURITIES AND EXCHANGE COMMISSION • WASHINGTON, D.C. 20549

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM ADV

1. This Form and any Schedules and continuation sheets required in connection with it shall be completed and filed in triplicate with the Securities and Exchange Commission, Washington, D.C. 20549. Retain one exact copy for your records. All information required by Form ADV and any Schedule thereunder must be submitted on the officially prescribed forms, additional copies of which are available, upon request, at any office of the Commission.

2. If the space provided for any answer on the Form is insufficient, the complete answer shall be prepared on Schedule E, which shall be attached to the Form. If the space provided for any answer on the Schedules is insufficient, the answer shall be completed on additional copies of the applicable Schedule which shall also be attached to the Form.

3. Individuals' names, except the executing signature in Item 9, shall be given in full wherever required (last name, first name, middle name).

4. All three copies of this Form filed with the Commission shall be executed with a *manual signature* in Item 9. If the Form is filed by a sole proprietor, it shall be signed by the proprietor; if it is filed by a partnership, it shall be signed in the name of the partnership by a general partner; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent—i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs; if filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized.

5. A Form which is not prepared and executed in compliance with applicable requirements may be returned as not acceptable for filing. However, acceptance of this Form shall not constitute any finding that it has been filed as required or that the information submitted is true, current or complete.

SPECIAL INSTRUCTIONS FOR FILING FORM ADV AS AN APPLICATION

6. If Form ADV is being filed as an application for registration, all applicable items must be answered in full. If any "item" is not applicable, indicate by "none" or "N/A" as appropriate. Items requiring information relating to the business activities of applicant should be answered to disclose what

such activities will be when registration becomes effective.

7. Consult Rule 0-2 to determine whether any non-resident of the United States named in the Form is required to file a consent to service of process and power of attorney.

SPECIAL INSTRUCTIONS FOR AMENDING FORM ADV

8. Rule 204-1(b) requires that if the information contained in the application, or in any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly on Form ADV correcting such information.

9. A completed page 1, including the Execution, must be filed with each amendment. Otherwise only the pages being amended need be filed.

CAUTION: WHEN ANY ITEM ON A PAGE IS AMENDED, IT IS NECESSARY TO ANSWER ALL ITEMS ON THE PAGE BEING AMENDED. PAGES WHICH CONTAIN OBSOLETE INFORMATION ARE RETIRED TO THE COMMISSION'S INACTIVE FILES.

DEFINITIONS: Unless the context clearly indicates otherwise, all terms used in the Form have the same meaning as in

the Investment Advisers Act of 1940, as amended, and in the General Rules and Regulations of the Commission thereunder.

FORM ADV(Revised: 9-1-68)
Page 1.**APPLICATION FOR REGISTRATION AS AN INVESTMENT
ADVISER OR TO AMEND SUCH AN APPLICATION UNDER
THE INVESTMENT ADVISERS ACT OF 1940**

SECURITIES AND EXCHANGE COMMISSION • WASHINGTON, D.C. 20549

SEC USE
FILE NO. 801-
DOC SEQ. NO.

(Read instruction sheet before preparing Form. Please print or type.)

1. (a) If this is an APPLICATION for registration, check here, ☐ and complete all items in full.
(b) If this is an AMENDMENT to an Application, check here, ☐ and specify below all parts which are amended.
- Item(s) _____ of Page 1 of Form ADV Schedule A _____ Schedule B _____
Item(s) _____ of Page 2 of Form ADV
Item(s) _____ of Page 3 of Form ADV Schedule C _____ Schedule D _____ Schedule E _____

2. Full name of Applicant or Registrant: (If individual, state last, first, middle name)

3. Name under which business is conducted, if different:

4. If name of business is hereby amended, state previous name here:

5. Address of principal place of business: (Do not use P.O. Box Number)

(No. and Street)

(City)

(State)

(ZIP Code)

6. Mailing address, if different:

7. Is Applicant taking over all or substantially all of the assets and liabilities and continuing the business of a registered investment adviser?

If yes, state:

Yes ☐ No ☐

(a) Date of succession: _____

(b) Full name and IRS Empl. Ident. No. of predecessor: _____

(c) Address of predecessor: _____

(No. and Street)

(City)

(State)

(ZIP Code)

8. Applicant or Registrant consents that notice of any proceeding before the Commission in connection with its application for or registration as an investment adviser may be given by sending notice by registered or certified mail or confirmed telegram to the person named below, at the address given.

(Last name)

(First name)

(Middle name)

(No. and Street)

(City)

(State)

(ZIP Code)

9. EXECUTION: The Applicant or Registrant submitting this Form and its attachments and the person by whom it is executed represent hereby that all information contained therein is true, current and complete. It is understood that all required items and Schedules are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Schedules remain true, current and complete as previously submitted.

Dated the _____ day of _____, 19____

(Name of Corporation, Partnership or other organization)

(Manual signature of Sole Proprietor, General Partner,
Managing Agent or Principal Officer)

(Title)

**ATTENTION—Intentional misstatements or omissions of
facts constitute Federal Criminal Violations. (See 18 U.S.C.
1001 and 15 U.S.C. 80b-17)**

(All items on this page must be answered in full.)

DO NOT WRITE BELOW THIS LINE—FOR SEC USE

FORM ADV, page 2

10. Applicant or Registrant is: (Check one box)
- ☐ A corporation ☐ A partnership
- ☐ A sole proprietorship ☐ Other (specify) _____

11. If Applicant or Registrant is a sole proprietor, state full residence address:

(Number and Street)

(City) (State) (ZIP Code)

12. If Applicant or Registrant is a corporation:

- (a) State date and place of incorporation: _____

- (b) List below:

(Classes of equity securities) (Voting or Non-Voting)

- (c) Complete Schedule A for (1) officers, directors and persons with similar status or functions and (2) any other person who is directly or indirectly the beneficial owner of 1 percent or more of the authorized shares of any class of equity security of applicant or registrant.

13. If Applicant or Registrant is a partnership, complete Schedule B.

REMINDER: If a registered partnership is dissolved and a new one is created to continue the business of the old one, the new partnership must file a new application for registration as an investment adviser.

14. If Applicant or Registrant is other than a sole proprietorship, partnership, or corporation:

- (a) Describe here the type of organization or association: _____

- (b) Complete Schedule C.

15. (a) Does any person not named in Items 2 and 12-14, inclusive, or any Schedule thereunder, directly or indirectly, through agreement or otherwise, exercise or have power to exercise a controlling influence over the management or policies of Applicant or Registrant? Yes ☐ No ☐

If "Yes," state on Schedule E the full name (last, first, middle) of each such person and describe the agreement or other basis through which such person exercises a controlling influence.

- (b) Is the business of Applicant or Registrant wholly or partially financed, directly or indirectly, by any person not named in Items 12-14, inclusive, or any Schedule thereunder in any manner other than by: (1) a public offering of securities made pursuant to the Securities Act of 1933; (2) credit extended in the ordinary course of business by suppliers, banks or others; or (3) a satisfactory subordination agreement, as defined in Rule 15c3-1 under the Securities Exchange Act of 1934. Yes ☐ No ☐

If "Yes," state on Schedule E the full name (last, first, middle) of each such person and describe the agreement or arrangement through which such financing is made available, including amount thereof.

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one. No Schedule required by any item on this page need be filed with an amended item unless the Schedule itself is amended.

SEC. LINE	
FILE NO.	DOC. REG. NO.
801-	

16. State whether the Applicant or Registrant, any person named in Items 12, 13, 14 and 15 or any Schedule thereunder, or any other person directly or indirectly controlling or controlled by the Applicant or Registrant, including any employee:

- (a) Has been found by the Commission to have made or caused to be made in any application for registration or in any report filed with the Commission under the Investment Advisers Act of 1940, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or to have omitted to state in any such application or report any material fact which was required to be stated therein. Yes ☐ No ☐

- (b) Has been convicted within 10 years of any felony or misdemeanor (1) involving the purchase or sale of any security, (2) arising out of the conduct of the business of a broker, dealer, or investment adviser; (3) involving embezzlement, fraudulent conversion, or misappropriation of funds or securities; or (4) involving violation of Section 1341, 1342 or 1343 of Title 18 United States Code (mail fraud, fraud by wire [including telephone, telegraph, radio or television]). Yes ☐ No ☐

- (c) Is permanently or temporarily enjoined by order, judgment, or decree of any court from acting as an investment adviser, underwriter, broker or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security. Yes ☐ No ☐

- (d) Has been found by the Commission or any court to have violated or to have aided, abetted, counselled, commanded, induced or procured the violation by any other person of the Securities Act of 1933, or the Securities Exchange Act of 1934, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of any rule or regulation under any of such Acts, or to have failed reasonably to supervise another person who committed such a violation. Yes ☐ No ☐

- (e) Has been the subject of an order of the Commission entered pursuant to paragraph (7) of Section 15(b) of the Securities Exchange Act of 1934, as amended, barring or suspending the right of such person to be associated with a broker or dealer. Yes ☐ No ☐

- (f) Has been denied membership or registration with or suspended, revoked or expelled from membership or registration with the National Association of Securities Dealers, Inc., or any national securities exchange; or has been suspended or barred from being associated with any member of such association or any member of such exchange. Yes ☐ No ☐

- (g) Has been found to have been a cause of the denial, suspension, revocation or expulsion of any person's membership or registration with the National Association of Securities Dealers, Inc. Yes ☐ No ☐

- (h) Has been denied registration (license) with or suspended, revoked or expelled from registration (license) with any state, territory or the District of Columbia or any agency thereof as a broker-dealer, investment adviser, securities salesman or as a person associated with a person engaged in such business. Yes ☐ No ☐

- (i) Has been the subject of any order, judgment, decree or other sanction of any foreign court, foreign exchange, or foreign governmental or regulatory agency arising out of any securities or investment advisory activities? Yes ☐ No ☐

- (j) Has been within the past 10 years, the subject of any cease and desist, desist and refrain, prohibition or similar order which was issued by any state, territory or the District of Columbia, arising out of the conduct of the business as a broker-dealer or investment adviser? Yes ☐ No ☐

If this is an amendment and the answer to any paragraph of this item is changed from "Yes" to "No," explain on a separate Schedule E.

SEC USE	
FILE NO.	DOC. SEQ. NO.
001-	

17. Complete a separate Schedule D for each natural person named in Items 2, 12, 13, 14 and 15 or any Schedule thereunder, except that Schedule D need not be furnished for any person who meets both of the following conditions: (1) he owns less than 10 percent of any class of equity security of applicant or registrant and (2) he is not an officer, director or person with similar status or functions. Also, complete a separate Schedule D for each person subject to any action reported under Item 16.

18. Does Applicant or Registrant:

(a) Furnish "Investment supervisory services," defined as the giving of continuous advice to clients as to the investment of funds on the basis of individual needs of each client (distinguish from continuous advice of any nature which is not based on consideration of all relevant factors; e.g., the nature and amount of other assets, investments and insurance, and the nature and extent of the personal and family obligations of each client)? Yes ☐ No ☐

(b) Manage securities accounts for clients under circumstances not involving "Investment supervisory services"? Yes ☐ No ☐

(c) Furnish investment advice through consultations (not as part of (a) or (b) above)? Yes ☐ No ☐

(d) Issue periodic publications relating to securities on a subscription basis? Yes ☐ No ☐

(e) Prepare or issue special reports or analyses relating to securities, not included in any service described above? Yes ☐ No ☐

(f) Prepare or issue, not as part of any service described above, any charts, graphs, formulas or other devices which clients may use to evaluate securities? Yes ☐ No ☐

(g) Furnish investment advice in any manner not described above? Yes ☐ No ☐

If the answer to any of the preceding paragraphs is "Yes," furnish full details on Schedule E.

With respect to paragraphs (a), (b), (d), (e), (f) and (g) such details should include the name of each publication, special report and analysis issued, the basis of compensation and when such compensation is payable.

19. (a) Is Applicant or Registrant engaged in any business or profession other than acting as investment adviser with respect to securities? (If so, describe briefly on a Schedule E such other business or profession.) Yes ☐ No ☐

(b) Is the principal business of Applicant or Registrant that of an investment adviser? Yes ☐ No ☐

(c) Does a substantial part of Applicant's or Registrant's investment advisory business consist of rendering "Investment supervisory services" as defined in Item 18(a) above? Yes ☐ No ☐

20. Does Applicant or Registrant control directly or indirectly any partnership, corporation or any other organization engaged in the securities or investment advisory business? If "Yes," furnish name and address of such organization and describe the nature of control on Schedule E. Yes ☐ No ☐

21. Does Applicant or Registrant, or any person connected with Applicant or Registrant, have discretionary authority to make any of the following determinations without obtaining the consent of the investment advisory client before the transaction is effected:

(a) Where securities are to be bought or sold? Yes ☐ No ☐

(b) Which securities are to be bought or sold? Yes ☐ No ☐

(c) The total amount of the securities to be bought or sold? Yes ☐ No ☐

22. Does Applicant or Registrant, or any person connected with Applicant or Registrant, have authority to obtain custody or possession of:

(a) Securities of any investment advisory client? Yes ☐ No ☐

(b) Funds of any investment advisory client? Yes ☐ No ☐

23. Does Applicant or Registrant, or any person connected with Applicant or Registrant, have regularly or periodically custody or possession of:

(a) Securities of any investment advisory client? Yes ☐ No ☐

(b) Funds of any investment advisory client? Yes ☐ No ☐

REMINDER: Rule 206(4)-2 contains special provisions relating to investment advisers who have custody or possession of securities or funds of their advisory clients.

24. Does Applicant or Registrant:

(a) As principal, sell securities to or buy securities from any investment advisory client? Yes ☐ No ☐

(b) Effect securities transactions as broker or agent for any investment advisory client? Yes ☐ No ☐

(c) As broker or agent for any person other than an investment advisory client, sell securities to or buy securities from clients? Yes ☐ No ☐

(d) Recommend to investment advisory clients or prospective clients, the purchase or sale of securities in which the applicant or registrant, directly or indirectly, has a position or interest? Yes ☐ No ☐

(e) Impose any restrictions upon itself or any person associated with it when effecting transactions for its or their account in securities recommended to clients? (If the answer to item 24(e) is "yes," describe such restrictions on Schedule E.) Yes ☐ No ☐

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one.

No Schedule required by any item on this page need be filed with an amended item unless the Schedule itself is amended.

Schedule A of FORM ADV

(Answers in response to ITEM 12(c) of FORM ADV.)

File No. 801-			IRS. Empl. indent. No.		
SEC. USE					
Status	S.P.C.O.	Rel.	D.S. Suffix 00	Tran. Code	Ctl. Seq. A0
Doc. Seq. Number			Date		State

I. Full name of Applicant or Registrant exactly as stated in Item 2 of Form ADV:

II. Name under which business is conducted if different:

III. Complete and mark appropriate columns for (a) officers, directors and persons with similar status or functions and (b) any other person who is directly or indirectly the beneficial owner of authorized shares of any class of equity security of applicant or registrant. Place an asterisk (*) after the name of the person for whom a change in title, status or stock ownership is being reported. Place a double asterisk (**) after the names of persons which are ADDED to those furnished in the most recent previous filing.

FULL NAME			RELATIONSHIP		SEC. USE	SOCIAL SECURITY NUMBER	% of OWNERSHIP					CLASS	SEC. USE
			BEGINNING DATE	TITLE OR STATUS			From 0 To 10	Above 10 To 25	Above 25 To 50	Above 50 To 75	Above 75 To 100		
Last	First	Middle											
						01							
						02							
						03							
						04							
						05							
						06							
						07							
						08							
						09							
						10							
						11							
						12							
						13							
						14							
						15							
						16							

IV. List below names reported in the most recent previous filing pursuant to this Item which are DELETED hereby:

Last	FULL NAME		ENDING DATE		SOCIAL SECURITY NUMBER	Date as stated in ITEM 9 of FORM ADV accompanying this Schedule.
			Mo.	Yr.		

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one.

Schedule B of FORM ADV

(Answers in response to ITEM 13 of FORM ADV.)

I. Full name of Applicant or Registrant exactly as stated in Item 2 of Form ADV:

II. Name under which business is conducted if different:

III. List all General, Limited and Special Partners. For each partner, complete and mark appropriate column below. Place an asterisk (*) after the name of the person for whom a change in title, status or partnership interest is being reported. Place a double asterisk (**) after the names of persons which are ADDED to those furnished in the most recent previous filing.

FULL NAME			BEGINNING DATE		TYPE . OF PARTNER	SEC. USE	SOCIAL SECURITY NUMBER	PERCENT OF CAPITAL CONTRIBUTION						SEC. USE
			Mo.	Yr.				From 0 To 10	Above 10 To 25	Above 25 To 50	Above 50 To 75	Above 75 To 100		
Last	First	Middle												
						Ø1								
						Ø2								
						Ø3								
						Ø4								
						Ø5								
						Ø6								
						Ø7								
						Ø8								
						Ø9								
						1Ø								
						11								
						12								
						13								
						14								
						15								

IV. List below names reported in the most recent previous filing pursuant to this Item which are DELETED hereby:

<i>Last First Middle</i>	ENDING DATE		SOCIAL SECURITY NUMBER	Date as stated in ITEM 9 of FORM ADV accompanying this Schedule.
	Mo.	Yr.		

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one.

(Answers in response to ITEM 14(b) of FORM ADV.)

1. Full name of Applicant or Registrant exactly as stated in Item 2 of Form ADV:

11. Name under which business is conducted if different:

III. List below any person, including a trustee, who directs, manages or participates in directing or managing the affairs of the Applicant or Registrant. As to each person listed below, state his title or status and describe the nature of his authority and his beneficial interest in the Applicant or Registrant. Place an asterisk (*) beside the name of the person for whom a change in title, status or partnership interest is being reported. Place a double asterisk (**) after the names of persons which are ADDED to those furnished in the most recent previous filing.

IV. List below names reported in the most recent previous filing pursuant to this Item which are DELETED hereby:

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one.

Schedule D of FORM ADV

(Answers in response to ITEM 17 of FORM ADV.)

SEC. USE	
FILE NO 801-	DOC. SEQ. NO.

I. Full name of Applicant or Registrant exactly as stated in Item 2 of Form ADV:

IRS Empl. Ident. No.

II. Full name of person for whom this Schedule is being completed:

IRS Empl.
Ident. No. or
Soc. Sec. No.

SEC. USE

III. Resident address of person: (Number and Street, City, State, ZIP Code)

Mo. Day Yr.

IV. NAMES USED: Furnish below a list of all names individual has been known by or has used including maiden name if married (Last name, first name, middle name). If no other names used, state "None."

Last

FULL NAME
First

Middle

SEC. USE

V. EDUCATION: Furnish below a description of the education for the person named in Part II of this Schedule (include name and location of last high school attended, name and location of any college or university attended, degree received and year it was received.)

VI. BUSINESS BACKGROUND: Furnish below a complete, consecutive statement of all business experience and employment for the past ten years. List the last position first. If none, state "None."

NAME OF FIRM AND ADDRESS	KIND OF BUSINESS	EXACT NATURE OF CONNECTION OR EMPLOYMENT	BEGINNING DATE		ENDING DATE	
			Mo.	Yr.	Mo.	Yr.

VII. PROCEEDINGS: If any answer to any paragraph of Item 16 is "Yes" with respect to the person for whom this Schedule is being completed, furnish the following details.

Applicable Paragraph of Item 16	TITLE OR DESCRIPTION OF ACTION	NAME AND LOCATION OF COURT, AGENCY, ASSOCIATION OR EXCHANGE	NATURE AND DATE OF DISPOSITION OF PROCEEDING	Date as stated in ITEM 9 of FORM ADV accompanying this Schedule.

If any item on this page is amended, you must answer in full all other items on this page and file with a completed and executed page one.

